

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH E. McNELLIS and PAMELA A.
McNELLIS,

Plaintiffs,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
NORTHWEST TRUSTEE SERVICES, INC.,
WELLS FARGO BANK, N.A.,

Defendants.

No. 3:11-cv-05475 RBL

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS
[Dkt. #s 21 &22]

INTRODUCTION

THIS MATTER is before the Court on Defendants' Motion to Dismiss under Rule 12(b)(6), for failure to state a claim upon which relief can be granted. [Dkt. #21].

The case arises from Plaintiffs' refinance of their Property. Plaintiffs defaulted on their mortgage, the lenders foreclosed. Plaintiffs assert a variety of claims against Defendants, based upon their contention that Note and Deed of Trust were invalid and the foreclosure was wrongful.

For the reasons below, the Defendants' Motion to Dismiss is GRANTED.

BACKGROUND

On September 10, 2008, Plaintiffs Joseph and Pamela McNellis refinanced their Property, borrowing money from Terrace Mortgage Company, in exchange for a promissory note. The Note was secured by a Deed of Trust which named Defendant Mortgage Electronic Registration

1 Systems, Inc. (MERS) as nominee and beneficiary. On November 11, 2010, MERS assigned the
2 Deed to Defendant Wells Fargo Bank by a recorded assignment of Deed of Trust. A copy of the
3 Note attached to Plaintiffs' Complaint shows that the Note is indorsed twice: first by Terrace to
4 Wells Fargo, and second, indorsed in blank by Wells Fargo.

5 On November 15, 2011, Wells Fargo appointed Defendant Northwest Trustee Services,
6 Inc. (NWTs) as successor trustee by a recorded appointment of successor trustee. Plaintiffs
7 defaulted, and on December 22, 2010, NWTs recorded a notice of trustee's sale.

8 Plaintiffs filed this action¹ for money damages on June 2, 2011, asserting a variety of
9 claims including wrongful foreclosure. Plaintiffs assert that their Note was incorrect and that
10 default cannot be proven. Plaintiffs claim Defendants violated the Fair Debt Collection Practices
11 Act, (FDCPA), Fair Credit Reporting Act (FCRA), and the Real Estate Settlement Procedures
12 Act (RESPA). Plaintiffs also seek declaratory and injunctive relief.

13 On July 1, 2011, Plaintiffs declared bankruptcy, which automatically stayed this action.
14 Plaintiffs' bankruptcy was dismissed without discharge on September 6, 2011 (*see* W.D. Wash.
15 Bankr. Case No. 11-45388-BDL), and the stay was lifted.

16 Defendants MERS and Wells Fargo moved to Dismiss all claims [Dkt. #21], and
17 Defendant Northwest Trustees joined the Motion [Dkt. #22].

18 **DISCUSSION**

19 **1. Standard for Dismissal**

20 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal
21 theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
22 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege
23 facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937,
24 1949 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual
25 content that allows the court to draw the reasonable inference that the defendant is liable for the
26 misconduct alleged." *Id.* Although the Court must accept as true the Complaint's well-pled facts,
27 conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper

28 ¹ Plaintiffs sought to enjoin the foreclosure but that Motion was denied. *See* Dkt. #19

1 [Rule 12(b)(6)] motion. *Vasquez v. L. A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell*
2 *v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation to
3 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,
4 and a formulaic recitation of the elements of a cause of action will not do. Factual allegations
5 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,
6 550 U.S. 544, 555 (2007) (citations and footnote omitted). This requires a plaintiff to plead
7 “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at
8 1949 (citing *Twombly*).

9 Plaintiffs do not seek to amend their complaint, but the Defendants do seek dismissal
10 with prejudice. Leave to amend shall be freely given when justice so requires. Fed. R. Civ. P.
11 15(a). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject
12 of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Foman v. Davis*,
13 371 U.S. 178, 182 (1962). On a 12(b)(6) motion, “a district court should grant leave to amend
14 even if no request to amend the pleading was made, unless it determines that the pleading could
15 not possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal.*
16 *Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990).

17 However, where the facts are not in dispute, and the sole issue is whether there is liability
18 as a matter of substantive law, the court may deny leave to amend. *Albrecht v. Lund*, 845 F.2d
19 193, 195-196 (9th Cir. 1988).

20 **2. “Incorrect Note” Claim**

21 The McNellis assert a cause of action for an “incorrect note.” They claim that the Note
22 originally signed was “unregistered and non-negotiable.” [Complaint, Dkt. #1 at 10]. They argue
23 that Terrace’s indorsement to Wells Fargo, and Wells Fargo’s indorsement in blank, void the
24 Note. They argue that Terrace’s indorsement to Wells Fargo unilaterally changed the terms and
25 conditions after Plaintiffs signed the Note. They assert that the Note is “discharged” and the
26 Deed no longer “secures the Note.” [Dkt. #1 at 12]. Because Plaintiffs claim does not actually
27 allege any unlawful conduct by Defendants, Plaintiffs’ claim fails.

1 Washington law clearly provides that negotiable instruments may be indorsed. Under the
2 Uniform Commercial Code, a bearer may indorse the instrument to another entity as a “special
3 indorsement.” RCW 62A.3-205(a). Additionally, RCW 62A.3-205(b) covers indorsement in
4 blank, whereby the Note is payable to the bearer. Under the Deed of Trust Act, a beneficiary is
5 “the holder of the instrument” RCW 61.24.005(2). The UCC defines a holder as “the
6 person in possession if the instrument is payable to bearer.” RCW 62A.1-201(20).

7 The Note here was indorsed in blank and gave the bearer, Wells Fargo, the right to
8 enforce it. The Deed of Trust Act also gives Wells Fargo, as beneficiary, the right to enforce the
9 Deed securing it. The Defendants’ actions were lawful, and their rights secured by state law.
10 The indorsements did not discharge the Note nor cause the Deed to cease securing the Note.
11 Plaintiffs fail to state a claim.

12 Defendants’ Motion to Dismiss Plaintiffs’ “incorrect note” action is GRANTED, and that
13 claim is DISMISSED with prejudice.

14 **3. “Erroneous Alleged Default” Claim**

15 The McNellisises assert that no default has actually occurred, because Defendants were not
16 the proper parties to declare default. Plaintiffs allege that Fannie Mae is the true beneficiary and
17 therefore the correct party to declare default. They claim that because Fannie Mae has not
18 declared default, no default exists. It is worth noting that Plaintiffs do not deny they have failed
19 to make the required payments, and do not assert that they have.

20 Plaintiffs claim the notice of default and notice of sale were inadequate, because they are
21 not confident Wells Fargo actually owns the Note. Plaintiffs argue that the indorsements
22 discussed above rendered the Note moot, somehow terminating Plaintiffs’ obligations to make
23 payments on it.

24 Plaintiffs’ argument regarding the indorsements is rejected above. Their obligations to
25 continue paying on the Note remained. Their failure to make payments undercuts their argument
26 that they are not in default.

27 The McNellisises’ claim that the incorrect party declared default is not supported by
28 factual allegations. Plaintiffs’ fail to assert any fact showing that Fannie Mae was the

1 beneficiary of the Deed or that Fannie Mae held the Note itself. Rather, factual allegations point
2 to Wells Fargo as the holder of the note and beneficiary of the Deed, as discussed in the
3 preceding section. Plaintiffs do not believe Wells Fargo actually owned the Note. However, as
4 this Court has previously concluded, a defendant's "show me the note" argument is routinely
5 held as lacking merit and insufficient to defeat a Rule 12 motion to dismiss. *See Freeston v.*
6 *Bishop, White & Marshal, P.S.*, 2010 WL 1186276 (W.D. Wash., Mar. 24, 2010) (quoting
7 *Diessner v. Mortg. Elec. Reg. Sys.*, 618 F.Supp.2d 1184, 1187 (D. Ariz. 2009) (collecting cases)).
8 Defendants' Motion to Dismiss Plaintiffs' erroneous alleged default claim is GRANTED.

9 **4. Fair Debt Collection Practices Act Claim**

10 Plaintiffs claim violations of the FDCPA against Wells Fargo for failure to verify the
11 McNellis' debt within 30 days of a request to do so. Defendant Wells Fargo argues Plaintiffs
12 fail to state a claim because the FDCPA does not apply to Wells Fargo. Wells Fargo argues it is
13 a creditor, not a debt collector.

14 A creditor under the FDCPA is a "person who uses any instrumentality of interstate
15 commerce or the mails" to collect debts. 15 U.S.C. § 1692(a). It may also be a person "who
16 regularly collects or attempts to collect . . . debts . . . owed or due another." *Id.* It specifically
17 does not cover "a consumer's creditors." *Id.* It is well-settled that the statute does not apply to a
18 mortgage servicing company. *Segle v. PNC Mtg.*, 2011 WL 1098936, *7 (W.D. Wash. Mar. 25,
19 2011) (citing *Lal v. Am. Home Servicing, Inc.*, 680 F.Supp.2d 1218, 1224 (E.D.Cal.2010)).

20 Wells Fargo correctly points out that the indorsements on the Note demonstrate that
21 Wells Fargo was a creditor, or a loan servicer, and not a debt collector subject to the Act.
22 Additionally, the plaintiffs have not and cannot demonstrate that they were not in default. The
23 FDCPA does not apply, and Plaintiffs have failed to state a claim under it. Defendants' Motion
24 to Dismiss Plaintiffs' FDCPA claim is GRANTED, and Plaintiffs' FDCPA claims is
25 DISMISSED with prejudice.

26 **5. Fair Credit Reporting Act Claim**

27 Plaintiffs assert Wells Fargo violated the Fair Credit Reporting Act (FCRA) by
28 "erroneously reporting the obligation of [Terrace Mortgage Company] as if it were the obligation

1 of Plaintiff's." [Dkt. #1 at 15]. Plaintiffs offer no further allegation in their Complaint to
2 support the FCRA claim. They provide no detail regarding which provisions of the FCRA apply
3 or how they were violated. Defendants argue that by indorsing the Note to Wells Fargo, Terrace
4 did not relieve the McNellis of their obligation. Furthermore, Defendants assert that the FCRA
5 is largely applicable to credit reporting agencies, making it difficult to determine what exactly
6 Plaintiffs claim against Wells Fargo.

7 Plaintiffs do not plead with any particularity regarding the FCRA. It is not at all clear
8 what statutory provisions plaintiffs even claim are at issue here. In any event, as discussed
9 above, the indorsements made on the Note did not void Plaintiffs' obligations. Therefore, the
10 entire basis for this claim fails. Defendants' Motion to Dismiss Plaintiffs' FCRA claim is
11 GRANTED, and that claim is DISMISSED with prejudice.

12 **6. Real Estate Settlement Procedures Act Claim**

13 Plaintiffs assert that Defendants Wells Fargo and NWTs violated the Real Estate
14 Settlement Procedures Act (RESPA) by failing to adequately respond to a Qualified Written
15 Request. The Complaint does not allege a written request, its date, the subject matter, or any
16 other pertinent information. The McNellis fail to allege any fact regarding Defendants'
17 response or its inadequacy. In short, the factual bases for Plaintiffs RESPA claim are merely
18 conclusory statements insufficient to support a claim. *See Iqbal*, 129 S. Ct. at 1949 (citing
19 *Twombly*). Defendants' Motion to Dismiss Plaintiff's RESPA claim is GRANTED, and that
20 claim is DISMISSED with prejudice.

21 **7. Request for Declaratory Relief**

22 The McNellis seek a declaratory judgment that MERS' "service as a beneficiary under
23 the subject Deed of Trust has no basis in law or equity." [Dkt. #1 at 17]. This Court recognizes
24 as a threshold matter that no party in this suit claims that MERS is a beneficiary under the Deed.
25 A controversy does not exist where there is no disputed claim. This Court discussed above the
26 indorsements on the Note. The indorsements establish that Wells Fargo is the beneficiary. This
27 issue is therefore moot.
28

1 Additionally, this Court and the Ninth Circuit have both held that to argue MERS is not a
2 proper beneficiary is insufficient to defeat a Rule 12 motion to dismiss. *See, e.g., Vawter v.*
3 *Quality Loan Serv. Corp. of Wash.*, 707 F.Supp.2d 1115, 1126 (W.D. Wash. 2010); *see also*
4 *Cervantes v. Countrwide Home Loans, Inc.*, 2011 WL 3911031, *5 (9th Cir. Sept. 7, 2011). For
5 these reasons, Defendants' Motion to Dismiss Plaintiff's request for declaratory relief is
6 GRANTED, and this claim is DISMISSED with prejudice.

7 **8. Request for Injunctive Relief**

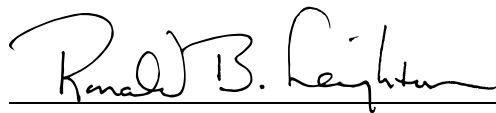
8 Plaintiffs seek permanent injunctive relief restraining further foreclosure proceedings.
9 This Court has previously denied temporary and preliminary injunctive relief in this case. [Order
10 Denying Motions for TRO and Preliminary Injunction, Dkt. #19]. The McNellis's request for
11 injunctive relief relies upon the success of their substantive claims, which this Court has
12 dismissed. Plaintiffs' request for permanent injunctive relief is therefore denied. Defendants'
13 Motion to Dismiss Plaintiffs' request for injunctive relief is GRANTED, and this claim is
14 DISMISSED with prejudice.

15 **CONCLUSION**

16 Defendants' Motion to Dismiss all claims is GRANTED. The facts are not in dispute,
17 and the sole issue is whether there is liability as a matter of substantive law. The court therefore
18 denies leave to amend, and the dismissal is with prejudice. *Albrecht v. Lund*, 845 F.2d 193, 195-
19 196 (9th Cir. 1988).

20 **IT IS SO ORDERED.**

21 Dated this 21st day of December, 2011.

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25 RONALD B. LEIGHTON
26 UNITED STATES DISTRICT JUDGE
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